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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JAMES STANLEY JONES,<br><br>Defendant and Appellant. | B211677<br><br>(Los Angeles County<br>Super. Ct. No. TA095943) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Judith L. Meyer, Judge. Affirmed.

Patricia Ihara, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Appellant James Stanley Jones was a passenger in Kory B.'s red Nissan Altima on September 16, 2007. At approximately 5:00 p.m., while waiting at a red light at the intersection of Catalina Street and Torrance Boulevard, appellant pointed his gun out the window and fired in the direction of two pedestrians, Emmanuel D. and Janet Ordorica, wounding Emmanuel and killing Ordorica. Appellant admitted the shooting, but claimed self-defense. The jury rejected self-defense, and convicted him of murder, attempted murder, and other offenses.

Appellant contends that the evidence was insufficient to support the findings that he did not act in self-defense and that Emmanuel suffered great bodily injury. Appellant also contends that the trial court erred in instructing the jury on the law of mutual combat, and in failing to instruct the jury as to attempted murder as a lesser included offense of murder. We conclude that the judgment is supported by substantial evidence, and that the trial court did not err in its charge to the jury. We thus affirm the judgment.

## PROCEDURAL BACKGROUND

Appellant was originally charged in April 2008 with one count of first degree murder and one count of attempted first degree murder, with sentence enhancements pursuant to Penal Code section 12022.53, subdivisions (b), (c), and (d), due to the use of a firearm.[1] The information alleged that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang, pursuant to section 186.22, subdivision (b)(1)(C). Appellant's first trial ended in a mistrial after the jury became deadlocked.

In addition to murder and attempted murder, an amended information charged appellant with two counts of shooting from a motor vehicle, in violation of section 12034, subdivision (c). The firearm and gang enhancements were alleged as to all four counts.

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[1] All further statutory references are to the Penal Code.

The second jury convicted appellant on all four counts, found the gun-use allegations true, and found the gang allegation not true. On October 16, 2008, the trial court stayed imposition of sentence as to counts 3 and 4, and imposed consecutive sentences of 25 years to life and life as to counts 1 and 2, each enhanced pursuant to section 12022.53, subdivision (d), for a total of 75 years to life in prison. Appellant filed a timely notice of appeal from the judgment.

## FACTS[2]

### A. *Prosecution Evidence*

1. *Eyewitness Testimony*

Ravenal C. testified that he stopped his truck at a red light in the area of Catalina Street and Torrance Boulevard. He saw Emmanuel and Ordorica, both Hispanic, walking along on the sidewalk on Catalina. Emmanuel was wearing a white T-shirt and baggy jeans, and his head was shaved. A red Nissan Altima had stopped behind Ravenal's truck, and an SUV had stopped directly behind the red Nissan. The red Nissan was occupied by Kory and appellant, both young, African-American men.

When Emmanuel and Ordorica reached the area of the sidewalk opposite the red Nissan, Ravenal watched the interaction between them and appellant through his rear and side view mirrors. Although their words were inaudible, appellant and Emmanuel appeared to be arguing. Emmanuel made a gesture by waving his hands back and forth, palms up. As Ordorica tried to pull Emmanuel away, Emmanuel placed his hand on his waistband. Ravenal did not see Emmanuel take anything from his waistband, but it

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**2** Because appellant has made a substantial evidence challenge, we would ordinarily summarize the evidence in the light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) However, in reviewing claims of instructional error, we view the evidence in the light most favorable to appellant's contentions. (See *People v. Wilson* (1967) 66 Cal.2d 749, 762; *People v. Petznick* (2003) 114 Cal.App.4th 663, 677-678.) We therefore summarize all the relevant evidence, and then apply the appropriate standard in our discussion of each issue.

looked as though he were pulling something. At the same moment, appellant began shooting at the two pedestrians, who turned and ran toward the nearby market. Ravenal testified that Emmanuel and Ordorica started running as soon as the first shot or shots were fired, and as they ran, Ravenal heard more shots. Ravenal's prior testimony was read to him. Then, Ravenal said that Emmanuel had reached underneath his shirt into his waistband. In this trial, however, Ravenal remembered that Emmanuel's T-shirt was very long, and although he tried to reach under it, his hand was never out of sight.

In his prior testimony, Ravenal also appeared to say that he heard the first gunshot just after the couple turned to run away—when asked whether Emmanuel was still facing the car when appellant's gun appeared, Ravenal replied, "Yes. Yeah. When the gun comes out he start -- start turning his back, and the girl, also. They start running. It's really fast." In the prior testimony, Ravenal was asked: "And then you -- and then you heard gunshots." Ravenal replied, "Yes." In this trial, Ravenal testified that his prior testimony was accurate.

2. *Kory's Testimony and Statements to Law Enforcement*

Kory testified that on September 16, 2007, appellant asked him to give him a ride to a girl's house. Kory picked him up in his red Nissan Altima, and appellant directed Kory to an area near Torrance Boulevard. Kory dropped him off and left, but before Kory had left the area, appellant called him back, explaining that there were too many "Mexicans" in the area. As they were leaving the neighborhood, they saw Emmanuel and Ordorica walking on the sidewalk approximately 40 feet away. Emmanuel was "mad dogging" the car as it approached a red light.[3]

Emmanuel turned toward the car, said something inaudible, and lifted his hand above his head, palms open, fingers spread, in a gesture that communicated, "What's

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[3] Kory explained that "mad dogging"' meant giving an evil look. Emmanuel testified that "mad dog" meant to stare at a person in a bad way, meant as a gang confrontation.

up?" Appellant rolled down the window and said he was from "111 Mob," then something inaudible, and "Crip." Emmanuel said the name of a gang, but Kory did not remember the name. Emmanuel took one step closer to the car, and still "mad dogging," he reached down into the area of his waistband, placed one hand under his T-shirt, while his other hand was still gesturing. At the same moment, appellant pulled a gun from his waistband and started shooting. Kory heard approximately five shots, one right after the other with no delay between them. A second later, Kory sped away. At no time prior to the shooting did appellant ask Kory to drive away.

Kory claimed that he was not a gang member and did not anticipate a shooting, even when Emmanuel had his hand at his waistband. Kory claimed that he had not seen a gun on appellant before then, and had no idea he was armed. Kory knew that appellant was a gang member when he gave him a ride, but when he pulled out the gun, Kory was shocked and nervous. Kory claimed that he and appellant were just friends, and had no agreement or discussion about confronting a rival gang. Kory thought that appellant had appeared normal that day. Although appellant had wanted to leave the neighborhood quickly, because there were too many "Mexicans" there, he did not say anything bad about Hispanics in general, or about Emmanuel or Ordorica when he saw them.

3. *Emmanuel's Testimony and Statements to Law Enforcement*

Emmanuel testified that he was shot in his arm, but claimed not to remember how he came to be shot. He had been at the home of his girlfriend, Janet Ordorica, and they were walking to the store. He claimed that many cars passed them as they walked, and that he did not remember seeing a particular car or being shot by anyone. The first thing about the incident that he recalled was being in the store with his girlfriend in his arms. He also remembered that the store clerk handed him a telephone, and that he called 911.

Emmanuel testified that the bullet in his arm went through and through, and he was hospitalized for two days due to the injury. When the wound healed, it left him with a scar but no lingering sensations.

The area of the shooting and the market where Emmanuel and Ordorica took refuge are in the territory of the T-Flats gang. Emmanuel admitted that he had been a member of the T-Flats, but denied being an active gang member, and claimed that he had promised Ordorica that he would not be involved in gang-related behavior while they were together. However, he admitted that he still had T-Flats tattoos on his head, and that they were visible at the time of the shooting, because his head was shaved. Emmanuel denied that the T-Flats were engaged in rivalry or war with any African-American gang at the time of the shooting.

Emmanuel denied that he had been carrying a weapon of any kind at the time of the shooting. However, he admitted that he had been convicted of several felony firearm offenses in the past two years and was currently serving a prison term. He also denied having simulated a gun with his hand that day.[4]

Emmanuel admitted that by claiming he did not remember, he was, in essence, refusing to testify, although he truly did not remember some details. He denied there was a gang "code" against cooperating with the police or testifying in court, although he guessed that his own gang might hurt him if he testified about how he was shot. Emmanuel admitted that he had been interviewed by the police after the shooting, and he told one of the deputies what had happened that day, but he responded, "I don't recall that" or "I don't remember," to each of the prosecutor's questions regarding his statements in the interview. Finally, the parties stipulated that Emmanuel was not willing to answer any questions relating to the shooting, and would continue to claim that he did not remember the events.

Los Angeles County Sheriff's Deputy, Sergeant Ken Perry, interviewed Emmanuel on October 18, 2007. Perry testified that Emmanuel told him that the passenger was the first to utter a gang challenge or words of gang affiliation. Emmanuel

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[4] Los Angeles County Deputy Sheriff Eric Ehrhorn, who arrived at the market within a few minutes of Emmanuel's 911 call, testified that he found no weapons on Emmanuel or elsewhere in the area.

also told Perry that he did not have a weapon that day, and had reached into the waistband of his pants to simulate having a firearm there. He did it to intimidate the men in the red Nissan, primarily because he was afraid that they might assault him and Ordorica, but also because they were insulting him by being in his neighborhood. He said that while he was still holding his hand at his waistband, the front passenger pointed a handgun and fired several shots. Then, he and Ordorica ran around the corner and into the market.

Perry brought a copy of the store surveillance video. It was played for the jury, and Perry pointed out a small dark sedan and a pick-up truck turning onto Torrance Boulevard. On the video, several shots are heard a split second before Emmanuel and Ordorica come into view, running around the corner from the side of the market to the front. Emmanuel stops just before they reach the market entry, Ordorica turns toward him, and for a moment faces the street as the small dark sedan speeds past. The two then run into the store.

Los Angeles County Sheriff's Detective Mark Wadel, who had interviewed Emmanuel in November 2007, brought a recording of his interview to court, and it was played for the jury. In the interview, Emmanuel told Detective Wadel that the shooter said, "Fuck Flats" when he pulled out the gun and started shooting. Emmanuel said that he and Ordorica were holding hands and were close to the store when they were hit.

4. *Sergeant Perry's Testimony and Interview*

Sergeant Perry went to the Catalina Market the day of the shooting, and supervised the processing of the crime scene. He recovered six expended bullet casings that had been ejected from a semiautomatic handgun. He found a blood trail on the sidewalk leading to the market entrance, and observed two bullet strikes on the east wall of the Catalina Market.

Sergeant Perry interviewed appellant on December 7, 2007, after advising him of his *Miranda* rights.[5] At no time did appellant claim the he had fired his weapon in self-defense or that he had fired because he thought his life was in danger. Appellant denied that he had ever been in the area of Torrance Boulevard and Catalina Street, or had ever been involved in any shooting or altercation in that area. Appellant told Perry that his relationship with Kory was adversarial and that he had never been in Kory's car. Perry recorded the interview, and the recording was played for the jury.

5. *Firearms Expert*

Robert Keil, senior criminalist with the Los Angeles County Sheriff's Department, testified as the prosecution's firearms expert. He examined the bullet casings found at the scene and the bullet supplied to him by the coroner, and determined that they were consistent with having been fired from a 9-millimeter Luger semiautomatic handgun. He explained that firing such a gun more than once requires pulling the trigger forcefully, releasing, and then pulling the trigger forcefully again. He testified that firing the gun would require about 5 to 10 pounds of pressure, although the amount of force necessary to fire could be adjusted by a gunsmith to less than 5 pounds.

6. *Ordorica's Injuries*

Deputy Medical Examiner Kevin Young testified that he performed Ordorica's autopsy, and found two gunshot wounds, one fatal and one nonfatal. The fatal wound was caused by a bullet that entered Ordorica's left chest and travelled through the chest cavity, perforating the left lung, the heart, and the liver, before exiting into the upper right chest, where Dr. Young recovered it. The nonfatal wound was caused by a bullet that entered the victim's back, travelled through soft tissue, and exited her right shoulder.

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**5** See *Miranda v. Arizona* (1966) 384 U.S. 436.

7. *Gang Expert*

The prosecution's gang expert, Hawthorne Police Officer Mark Kirunchyk, testified that in his opinion, appellant was a member of the gang known as "118 Eucalyptus Mob Gangster Crips" or some variation of that name, such as, "Eucalyptus Mob," "118 Eucalyptus Mob," "118 U-Mob," and "118 Gangster Crips." The latter name shows an allegiance with the larger Gangster Crips in South Central Los Angeles. The Eucalyptus Mob is a criminal street gang that engages in robberies, shootings, and other crimes. Appellant bears tattoos demonstrating his allegiance to the Eucalyptus Mob and Gangster Crips. On one of the tattoos, "Eucalyptus Mob GC," the "L" is crossed out to signal disrespect for the Lennox 13 gang, a mostly Hispanic gang which is the Eucalyptus Mob's primary rival. That rivalry extends to other Hispanic gangs.

**B.** ***Defense Evidence***

Appellant was the sole witness presented in his defense. He testified that he was 19 years old, and at the time of the shooting, he lived with his great-grandmother in the Stevenson Village area of Carson. Appellant admitted that he had been a member of the Eucalyptus Mob gang, but claimed that he stopped associating with them the summer before.

Appellant testified that he had known Kory for approximately 15 years and that they were friends and "hung out" a lot. On September 16, 2007, appellant asked Kory for a ride to home of a girl he knew, Briana, whose last name appellant did not know. Appellant admitted that he lied to Sergeant Perry when he denied having called Kory that day. He lied because he became frightened when they told him he would be charged with murder.[6]

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[6] Appellant admitted that he lied throughout much of his interview with Sergeant Perry.

After Kory dropped appellant at Briana's house, appellant saw a group of men looking at him as though they might start "tripping on [him]." They said, "What's up, *ese*?" and spoke Spanish to him, giving appellant the impression they were making racial comments. Appellant pretended not to hear them, and entered Briana's home, but he realized that he was in the territory of a gang and became nervous at the thought of passing the men in the dark later. Five to 10 minutes after arriving, he called Kory to come back for him. Appellant told Kory that "[t]hese Mexicans might start tripping on me because I'm Black."

Appellant testified that he had with him the 9-millimeter handgun that he had begun carrying in July 2007, after a member of a rival African-American gang shot at him and his best friend, Reginald Hayes, killing Hayes. Appellant denied any rivalry with any Hispanic gangs or feeling any animosity toward Hispanics, and claimed to have many Hispanic friends.

Appellant described the events surrounding the shooting. He was seated in the passenger seat of Kory's car, when it stopped on Catalina Street, next to the market. Appellant saw Emmanuel and Ordorica walking along the sidewalk, and looked at them, but he did not call out to them, and did not roll down window in order to say something to them. He leaned back in his seat with his arms folded across his chest. Appellant testified that it was Emmanuel who stopped, called something out, and asked appellant where he was from. Appellant pretended not to hear him, but Emmanuel repeated his question, and started to move closer to the car, while Ordorica held him back. While trying to brush her off, Emmanuel repeatedly said, "What's up, *ese*." Emmanuel also asked, "Where are you from?" which appellant interpreted as asking what gang he represented. Appellant pretended not to hear him.

Appellant admitted that he rolled down the window, but denied that he yelled at Emmanuel, announced the name of his gang, or said, "Fuck T-Flats." Through the partially open window, appellant said, "I can't hear you," and pointed at his ear. When Emmanuel began to come toward the car, appellant thought he might try to snatch him

out of the car unless he said something. Appellant could tell that Emmanuel was gang member, and thought he was acting crazy, as though he were going to attack him. Appellant tried not to look at him, but Emmanuel "kept talking a bunch of mess," and "throwing his hood up." Appellant then said, "I get money, homie. That's it. That's all." Emmanuel replied, "What the fuck you *myates* [niggers] doing in my neighborhood?" and, "Ain't no blacks allowed over here." Emmanuel made gang signs, but appellant could not tell what gang they represented.[7]

At that moment, Emmanuel began speaking Spanish, lifted his shirt, pointing downward with his thumb up to simulate a gun, and then said, "I'm gonna pop your ass right now." Emmanuel kept approaching the car while Ordorica pulled on his arm. Emmanuel pushed her away, she tried again, and he pushed her away again, eventually coming "a little closer"—maybe 10 to 15 feet closer—to the car. Appellant saw the handle of a black gun as Emmanuel pointed to it. Appellant became very nervous, because they were hemmed in by two cars, and he thought Emmanuel intended to kill him.

Remembering how his friend died, appellant believed Emmanuel was about to pull his gun out and start shooting. It was for that reason appellant pulled his gun from his hoodie pocket, pointed it out the window, closed his eyes, and pulled the trigger. Appellant tried to aim at Emmanuel, not Ordorica, but it just happened very fast. Appellant remembered firing the gun only once, and thought he blacked out, because next thing he remembered was the car speeding off and entering the freeway. Appellant claimed that he had not intended to pull the trigger, but it just happened, because he feared that Emmanuel was going to kill him. Appellant denied that he fired from animosity or ill will. After the shooting, appellant tossed the gun into a canal in Watts.

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[7] Appellant admitted that if he had been an active gang member, a failure to respond to a challenge would have made his gang look bad.

After appellant's testimony, the parties stipulated that after the shooting, Kory asked appellant why he shot those two people, and appellant replied, "Fuck that. He deserved what he got. He was going in his pants. Rather him than us."

## DISCUSSION

1. *Substantial Evidence*

Appellant contends that the evidence was insufficient to support his conviction of the murder of Janet Ordorica, because the prosecution failed to carry its burden to prove beyond a reasonable doubt that the fatal shot was not fired in self-defense.[8]

Appellant first argues that substantial evidence is lacking because the evidence of self-defense was overwhelming. However, the issue in a review for substantial evidence is not whether the evidence favoring appellant was greater than the evidence supporting the verdict. (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) When a criminal conviction is challenged as lacking evidentiary support, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 578.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1019.)

Killing in self-defense is justified only if the defendant actually and reasonably believed that it was necessary to prevent imminent harm. (§ 198; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Whether the defendant's belief was reasonable is measured objectively, "'from the point of view of a reasonable person in the position of defendant . . . . [Citation.]" (*People v. Humphrey*, at p. 1083.)

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[8] Because self-defense negates the malice element of murder, the prosecution bears the burden to prove that the defendant did not act in self-defense. (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 571.)

Citing his own testimony, appellant argues that Emmanuel initiated the confrontation by asking, "Where are you from?" and by expressing anger that African-American men were in his territory. Again citing his own testimony, appellant claims that when Emmanuel reached toward his waistband, the handle of a gun was visible to appellant, and appellant thought Emmanuel was going to shoot him. The jury was not required to believe appellant's version of the events. (*People v. Harris* (1971) 20 Cal.App.3d 534, 537.)

Thus, the jury was entitled to reject appellant's claim that Emmanuel was the first to issue a gang challenge, and that appellant saw, or thought he saw, a gun in Emmanuel's waistband. It is the exclusive province of the jury to determine the credibility of a witness and the truth or falsity of the facts upon which a finding depends. (*People v. Barnes* (1986) 42 Cal.3d 284, 306.) Under the substantial evidence rule, the evidence that conflicts with the jury's findings must be disregarded as disbelieved by the jury. (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1316.) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Thus, we must accord due deference to the jury's resolution of a witness's credibility, and not substitute our own -- or appellant's -- evaluation. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

In this case, there was sufficient evidence to allow the jury to conclude that if appellant believed he was in imminent danger, his belief was unreasonable. Appellant rolled down the window and said, "111 Mob," then something inaudible, and "Crip." Emmanuel said the name of his gang, and appellant said, "Fuck Flats." No other witness saw a gun on Emmanuel, and Emmanuel denied having a gun in his possession. The investigating deputies found no gun in the area of the shooting. Appellant's statement—"He was going in his pants. Rather him than us."—suggests that appellant did not, in fact, see a gun, but took his gun from his pocket the moment Emmanuel reached down toward his waistband.

Although Ravenal had previously testified that Emmanuel reached underneath his shirt into his waistband, he remembered here that Emmanuel's T-shirt was very long, and although he *tried* to reach under it, his hand was never out of sight. Emmanuel's gesture did not lead Ravenal or Kory to believe that gunfire would ensue.

Moreover, Ravenal testified that Emmanuel and Ordorica turned to run away as soon as appellant pulled out his gun and before he began firing. A jury could reasonably conclude that it is unreasonable to believe that a fleeing victim poses an imminent danger. (See *People v. Wilson* (1976) 62 Cal.App.3d 370, 374-375.)

Appellant points out that Ravenal also testified that he heard a gunshot just before the couple turned to run away. However, Ravenal confirmed that it was his prior testimony—that they turned as soon as the gun appeared and before appellant fired—was accurate. Appellant would have this court resolve the conflict in his favor. However, the resolution of conflicts and inconsistencies in testimony, even those within the testimony of the same witness, are to be resolved by the jury. (*People v. Koontz* (1959) 171 Cal.App.2d 633, 634.) The jury's resolution is binding on the appellate court, unless the testimony is physically impossible or inherently improbable. (*People v. Young*, *supra*, 34 Cal.4th at p. 1181.) Neither the market video nor other evidence suggests impossibility or inherent improbability.

Appellant also contends that the evidence was insufficient to support the true finding under section 12022.53, subdivision (d), that he caused Emmanuel and Ordorica great bodily injury. Section 12022.53, subdivision (d), adds 25 years to life to the sentence for certain felonies if the defendant's personal use of a firearm in the commission of the felony proximately caused great bodily injury.

Appellant does not argue that the injuries were insufficiently severe. Appellant contends that the prosecution failed to prove that Emmanuel and Ordorica were wounded by later shots, rather than the first two shots. Thus, appellant concludes, assuming that they were wounded by the first shots, and those shots were fired in self-defense, the enhancement cannot apply to them.

The enhancement would apply, appellant argues, only if Emmanuel and Ordorica were wounded by one or more of the subsequent shots, which were not justified by self-defense. Appellant's reasoning assumes that each of the five shots was charged as a separate offense as to each victim, potentially giving rise to 10 crimes. However, appellant was not prosecuted under a theory that each shot was an independent crime. Appellant was charged with two crimes against each victim—murder and firing from a motor vehicle as to Ordorica, and attempted murder and firing from a motor vehicle as to Emmanuel. The evidence showed that the five shots fired in rapid succession were a continuous course of conduct, so closely connected in time as to form part of a single transaction. Thus, the jury did not have to decide which shot caused great bodily injury. (See *People v. Maury* (2003) 30 Cal.4th 342, 422.)

In any event, we cannot assume that the first shots or any of the shots were fired in self-defense, because we have found that substantial evidence supports the jury's finding that appellant did not fire in self-defense. We conclude that substantial evidence supports the enhancement.

2. *CALCRIM No. 3471: Mutual Combat*

Appellant contends that the trial court erred in instructing the jury with CALCRIM No. 3471, requested by the prosecution and given over appellant's objection. The court read:

> "A person who engages in mutual combat or who is the first one to use physical force has [the] right [to] self-defense only if:
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> "1. He actually and in good faith tries to stop[] fighting.
>
> "2. He indicates by word or by conduct to his opponent in a way that a reasonable person would understand that he wants to stop fighting and that he has stopped fighting.
>
> "3. He gives his opponent a chance to stop fighting.
>
> "If a person meets these requirements, he then has a right to self-defense if the opponent continues to fight.

> "If you find that the defendant started the fight using nondeadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting."

Appellant argues that the court erred for four reasons: (1) The instruction did not include a definition of "mutual combat"; (2) the phrase, "first one to use physical force" was ambiguous under the facts of this case, where there was evidence that the opponent's threat was a bluff; (3) the last paragraph is ambiguous, and could be interpreted as applicable only to a defendant who started the fight; and (4) substantial evidence did not support giving the instruction.

At the time of appellant's trial, CALCRIM No. 3471 did not include a definition of "mutual combat." The definition first appeared in the Fall 2008 edition of the Judicial Council of California Criminal Jury Instructions.[9] It was inserted in response to *People v. Ross* (2007) 155 Cal.App.4th 1033 (*Ross*), upon which appellant relies to support his contention that the court erred in reading CALCRIM No. 3471, and in doing so without the definition of "mutual combat."

In *Ross*, the defendant was convicted of aggravated assault and battery after he punched a woman who had slapped him during a heated argument, causing her to suffer a fractured cheekbone. (*Ross*, *supra*, 155 Cal.App.4th at p. 1036.) During deliberations, when the jury requested the legal definition of mutual combat, the trial court replied: "'[R]egarding your request yesterday for a legal definition of mutual combat, there is no legal definition. You're going to have to use your common, everyday meaning of those words or that phrase. Okay. I know that instruction that you were dealing with, No. 38, is about mutual combat, but there is no legal definition of it.'" (*Id.* at pp. 1042-1043.) The appellate court held that the trial court erred in giving a mutual combat instruction

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**9** CALCRIM No. 3471 now includes the following optional sentence: "A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self defense arose."

over a defense objection, because—under the facts of that case—"no reasonable juror could conclude beyond a reasonable doubt that defendant and [the victim] were engaged in 'mutual combat' when he punched her." (*Id.* at p. 1050.) The court also held that because the trial court's response to the jury request for a definition of "mutual combat" was erroneous, the defendant did not forfeit his challenge to the court's refusal to provide a definition. (*Id*. at p. 1049.)

The *Ross* court quoted *People v. Fowler* (1918) 178 Cal. 657, 671, as an example of longstanding, intact case law holding that "'the phrase "mutual combat" has been in general use to designate the branch of the law of self-defense relating to homicides committed in the course of a duel or other fight begun or continued by mutual consent or agreement, express or implied. [Citations.]'" (*Ross, supra*, 155 Cal.App.4th at p. 1045.) The court concluded that the definition of "mutual combat" was a legal question which the trial court was under a mandatory duty to clarify under section 1138, once the jury asked for a definition. (*Ross*, at p. 1047.) The court also concluded that because the law of self-defense in California allows the victim of an assault to "stand his ground," the phrase "mutual combat" may be ambiguous, unless the jury is told that "'mutual combat' means not merely a reciprocal exchange of blows but one pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities." (*Id*. at p. 1045.)

Ordinarily, a failure to request clarifying language to an instruction that is a correct statement of the law bars appellate review of the issue. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) In *Ross*, the appellate court held that the defendant had not forfeited the issue, because the trial court had erroneously instructed the jury in the absence of counsel, thus failing to fulfill its mandatory duty under section 1138 to answer the jury's inquiry correctly and in the presence of counsel. (*Ross, supra*, 155 Cal.App.4th at pp. 1047-1048.)

Here, in contrast, defense counsel did not request clarification of or elaboration on CALCRIM No. 3471, and the jury did not ask for a definition of mutual combat. The *Ross* court acknowledged that a failure to request elaboration on the instruction, before it

was originally given, could result in a forfeiture of the issue. (*Ross, supra,* 155 Cal.App.4th at pp. 1047-1048.) Thus, *Ross* does not support appellant's contention that the trial court must always define mutual combat, sua sponte.

Appellant did not request clarification of the other asserted ambiguities in the CALCRIM No. 3471. Thus, he has not preserved them for appellate review. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1192.)

Moreover, appellant has not shown here that the instruction was so ambiguous that reversal is required. "For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." (*People v. Mayfield* (1997) 14 Cal.4th 668, 777, citing *Boyde v. California* (1990) 494 U.S. 370, 380-381.) To apply that test, all instructions given should be considered, not simply a single instruction or isolated parts of an instruction, as appellant has done here. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Appellant has ignored most of the language of CALCRIM No. 505, which gave the jury exhaustive instructions on a defendant's right to defend himself, as well as CALCRIM No. 571, instructing the jury that it could find appellant guilty of voluntary manslaughter, based upon imperfect self-defense, if he had an actual, but unreasonable belief in the need to use deadly force to defend himself.

Jurors are presumed to have understood and correlated all the instructions. (*People v. Scott* (1988) 200 Cal.App.3d 1090, 1095.) As appellant has made no showing that the jury failed to do so or that the claimed ambiguities were not clarified by the language of other instructions, he has not demonstrated error requiring reversal. (See *People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1248.)

Appellant also contends that the mutual combat instruction should not have been given at all because substantial evidence did not support the existence of an agreement to engage in mutual combat. Appellant argues that Emmanuel initiated the confrontation to let appellant and Kory know they were unwelcome in the neighborhood, not to start a fight. The jury could reasonably have found otherwise. The evidence did not establish

that Emmanuel was the first to utter a gang challenge or that Emmanuel did not intend to start a fight. Emmanuel told Sergeant Perry that appellant was the first to say the name of his gang. Kory heard both appellant and Emmanuel announce the names of their gangs, but he did not say which was the first to do so.

Although combat is not mutual without an agreement or consent to fight, that agreement need not express, but may be implied. (See *People v. Fowler*, *supra*, 178 Cal. at p. 671; *Ross*, *supra*, 155 Cal.App.4th at p. 1045.) Substantial evidence supported a reasonable inference that appellant and Emmanuel tacitly or impliedly agreed to fight each other.[10] As appellant argues here, "any reasonable person in Jones's position would have believed that [Emmanuel], a Hispanic young male with a shaved head, belligerent attitude, obvious gang tattoos, . . . was going to shoot Jones." Certainly, rolling down the window to respond with an obscenity directed toward that young man's gang could reasonably be construed as a tacit or implied agreement to fight. Officer Kirunchyk testified that gang members use the name of their gang to inspire fear and intimidation, and appellant admitted in his testimony that when an active gang member is challenged, his failure to respond would make his gang look bad.

We conclude that the court did not err in giving the instruction.[11]

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[10] Appellant cites several cases that touch upon mutual combat by gangs, in order to distinguish them from the facts of this case. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 847-848; *Ross*, *supra*, 155 Cal.App.4th at p. 1046, fn. 16; *People v. Rogers* (1958) 164 Cal.App.2d 555, 557-558.) We agree that the cases are distinguishable. And as they neither support nor assail appellant's position, we do not discuss them further.

[11] It is unlikely that the jury relied on CALCRIM No. 3471. The prosecutor did not argue that appellant and Emmanuel were engaged in mutual combat. He argued that Emmanuel and Ordorica had begun running away before the shots were fired. The only mention of the issue came from defense counsel, who reminded the jury that the judge instructed that not all instructions given would apply to the facts, and counsel then argued that the instruction as to mutual combat did not apply at all.

3. *Attempted Murder as a Lesser Included Offense*

Appellant contends that the trial court erred in omitting an instruction on attempted murder as a lesser included offense of the murder of Ordorica. Appellant contends that the evidence showed that Ordorica's fatal chest wound may have been caused by the first shot he fired, and that he fired that shot before she began to flee. He surmises that her nonfatal back wound was caused by a subsequent shot, fired as she was running away.[12] Appellant contends that because the jury could have found that he fired the fatal shot in self-defense and the nonfatal shots without justification, the court should have instructed the jury that it could convict appellant of attempted murder in firing the nonfatal shots.

A trial court must instruct sua sponte only on all lesser included offenses that find substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) Attempted murder consists of a specific intent to kill a particular person and the commission of a direct but ineffectual act toward accomplishing the intended killing of that person. (*People v. Stone* (2009) 46 Cal.4th 131, 136.)

Appellant points to no evidence suggesting that he ever harbored an intent to kill Ordorica. Indeed, he testified that he aimed his first shot toward Emmanuel, and did not intend to shoot Ordorica. Nor did he intend for his subsequent shots to hit Ordorica, or even Emmanuel—he claimed that he blacked out and did not know that the gun fired more than once. Indeed, appellant claimed that he had not intended to pull the trigger at all—it just happened. There was sufficient evidence to support an intent to kill

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[12] Emmanuel told Detective Wadel that he and Ordorica were hit when they were close to the store. The medical examiner was not asked which was the probable first wound. The fatal bullet travelled through Ordorica's left chest cavity, and perforated her lung, heart, and liver. Appellant's inference that she continued to run around the corner and into the market after suffering such a wound is not an easy one to draw, but we will accept it for purposes of argument in this part.

Emmanuel, such as the hostile behavior and gang challenge, but an intent to kill one person does not transfer to an unintended victim for purposes of attempted murder. (*People v. Stone*, *supra*, 46 Cal.4th at pp. 136-137.)

Appellant acknowledges that the doctrine of transferred intent does not apply to attempted murder, but contends that this means that the court was required to instruct the jury as to the "kill zone" theory, in addition to attempted murder as a lesser included offense. However, the term "kill zone" is merely shorthand for *concurrent* intent, which "is not a legal doctrine requiring special jury instructions, as is the doctrine of transferred intent." (*People v. Bland* (2002) 28 Cal.4th 313, 331, fn. 6.) Such concurrent intent exists, for example, when the defendant intends to kill a person located in a group, and "'attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim.'" (*Id.* at pp. 329-330.)

Appellant did not use an automatic weapon or a bomb, or other weapon that would ensure that anyone near Emmanuel was killed. "[T]he existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense. The evidence must be "'substantial enough to merit consideration' by the jury. [Citations.]" (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) At most, the use of a semiautomatic weapon suggested that appellant did not care if his bullets struck someone other than Emmanuel. However, "[a]ttempted murder requires express malice, i.e., intent to kill. Implied malice—a conscious disregard for life—suffices for murder but not attempted murder." (*People v. Stone*, *supra*, 46 Cal.4th at pp. 139-140.)

We conclude that the trial court did not err in failing to instruct the jury sua sponte that it could convict appellant of the attempted murder of Ordorica as a lesser included offense of murder.

## DISPOSITION

The judgment is affirmed.

LICHTMAN, J.*

We concur:

RUBIN, ACTING P.J. FLIER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.